

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 12-3203 (RHK/LIB)
)	
DMH Partners North, LLC,)	
a Minnesota limited liability company;)	
et al.,)	
)	
Defendants.)	
)	

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers (“Corps”), filed the Complaint herein against Defendants DMH Partners North, LLC (“DMH”), a Minnesota limited liability company; Patrick T. Christiansen; Michael J. Christiansen; and Donald M. Huber (collectively, “Defendants”), alleging that Defendants violated sections 301 and 404 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311 and 1344;

WHEREAS, the Complaint alleges that Defendants violated CWA sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, by failing to abide by and fulfill the terms and conditions of permit number 2006-7123-TJH when DMH discharged dredged or fill material and/or controlled and directed the discharge of dredged or fill material into 7.11 acres of wetlands and other waters of the United States which abut an unnamed tributary of the Elk River, a tributary of the Mississippi River, on property located in Sauk Rapids, Benton County, Minnesota (the “Site”) and more fully described in the Complaint, and by violating a Corps administrative order;

WHEREAS, the Complaint seeks to require Defendants to (1) comply with the permit and mitigate the damages caused by their unlawful activities; and (2) pay civil penalties, pursuant to sections 309(d) and 404(s) of the CWA, 33 U.S.C. §§ 1319(d) and 1344(s);

WHEREAS, Defendants, as set forth below deny liability and assert that Jeffrey Draxten, a non-Defendant DMH member/agent, is responsible for the illegal conduct alleged in the Complaint and reserve any rights they may have to assert legal claims against him for his alleged misconduct;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims against Defendant DMH Partners North, LLC (DMH) under the CWA set forth in the Complaint regarding the Site;

WHEREAS, the United States and Defendant DMH agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendant DMH in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendant DMH in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and section 404(s) of the CWA, 33 U.S.C. §§ 1319 and 1344(s).

2. Venue is proper in the District of Minnesota pursuant to CWA section 404(s), 33 U.S.C. § 1344(s), and 28 U.S.C. §§ 1391(b) and (c), and 1395(a) because DMH conducts business in this District, the subject property is located in this District, and the causes of action alleged in the Complaint arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant DMH, its officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with Defendant DMH whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Defendant DMH, Defendant DMH shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with Defendant DMH, to take any actions necessary to comply with the provisions hereof.

III. SCOPE OF CONSENT DECREE

5. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against Defendant DMH under CWA section 404 concerning the Site.

6. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree shall have the objective of causing Defendant DMH to achieve and maintain full compliance with, and to further the purposes of, the CWA.

7. Except as in accordance with this Consent Decree, Defendant DMH and Defendant DMH's agents, members, successors, and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

8. Compliance with the obligations set forth in this Consent Decree resolves Defendant DMH's obligations and liabilities with respect to Army Corps permit number 2006-7123-TJH and Corps compliance orders issued regarding that permit. This Consent Decree is not and shall not be interpreted to be a permit or modification of any other existing permit issued pursuant to sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the United States Environmental Protection Agency's ability to exercise its authority pursuant to section 404(c) of the CWA, 33 U.S.C. § 1344(c).

9. This Consent Decree in no way affects or relieves Defendant DMH of its responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

10. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

11. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

12. With the exception of paragraphs 1 through 3 of this Consent Decree, nothing in this Consent Decree shall constitute an admission of fact, law, or liability by any party.

13. This Consent Decree has been executed by Donald M. Huber for DMH Partners North, LLC, who represents that he is authorized to do so on behalf of DMH Partners North, LLC. Donald M. Huber agrees to indemnify and hold harmless the United States from any claims that he does not possess the requisite authority to enter into this Consent Decree.

14. The individual Defendants named in the civil action are not parties to this Consent Decree. The United States agrees to dismiss voluntarily or move to dismiss, with prejudice, the civil action, including the individual Defendants (Patrick Christiansen, Michael Christiansen, and Donald Huber), upon Defendant DMH's full satisfaction of the civil penalty and wetland credit obligations required by this Consent Decree and after termination of the Consent Decree consistent with paragraph 38.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

15. Defendant DMH shall pay a civil penalty to the United States in the amount of Seventy-five Thousand Dollars (\$75,000), within 30 days after entry of this Consent Decree.

16. Defendant DMH shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing the U.S.A.O. file number 2010v00804. Payment shall be made in accordance with instructions provided to Defendant DMH by the Financial Litigation Unit of the United States Attorney's Office for the District of Minnesota. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty required by this Consent Decree, Defendant DMH shall provide written notice, at the addresses specified in Section VIII of this Consent Decree, that such payment was made in accordance with Paragraph 15.

18. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VII) are penalties within the meaning of section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21, and are not tax deductible expenditures for purposes of federal law.

MITIGATION

19. Defendant DMH shall purchase 9.04 wetland credits and 10.94 upland buffer credits from an approved wetland bank in accordance with the following parameters:

- a. Defendant DMH shall purchase all credits (both wetland and upland buffer) within 60 days after entry of this Consent Decree;
- b. All credits (both wetland and upland buffer) must be purchased from a Corps-approved wetland bank(s) in Minnesota Bank Service Area 7;
- c. In advance of their purchase, all proposed credit purchases must be approved by the Corps of Engineers. Such approval may be communicated to DMH through the United States Attorney's Office for the District of Minnesota via fax, email or other electronic means, and will be binding upon the Army Corps of Engineers.

20. Upon the purchase of any credits under this Consent Decree, Defendant DMH shall provide written notice, at the addresses specified in Section VIII of this Consent Decree, that such purchase was made in accordance with Paragraph 19. In addition to the requirements of Section V of this Consent Decree, the written notice shall include a copy of the wetland credit purchase record, together with a transmittal letter, which shall state that the payment is for the

purchase of credits pursuant to the Consent Decree in United States v. DMH Partners North, LLC, et al., and shall reference the civil action number above (Civil No. 12cv3203 (RHK/LIB) (D. Minn.)) and USAO file number 2010v00804.

V. NOTICES AND OTHER SUBMISSIONS

21. Within 30 days after the deadline for completing any task set forth in Section IV of this Consent Decree, Defendant DMH, through Donald M. Huber or one of its other members, shall provide the United States with written notice, at the addresses specified in Section VIII of this Consent Decree, of whether or not that task has been completed.

22. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

23. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, Defendant DMH shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. DISPUTE RESOLUTION

24. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendant DMH to attempt to resolve such dispute. The period for informal

negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendant DMH cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, Defendant DMH files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Defendant DMH shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that Defendant DMH's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

25. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. Defendant DMH shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, Defendant DMH shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that Defendant DMH's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

26. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant DMH under this Consent Decree, except as provided in Paragraph 29 below regarding payment of stipulated penalties.

VII. STIPULATED PENALTIES

27. After entry of this Consent Decree, if Defendant DMH fails to timely fulfill any requirement of the Consent Decree, it shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- | | | |
|----|--|--------------------|
| a. | For Day 1 up to and including
Day 30 of non-compliance | \$1,000.00 per day |
| b. | For Day 31 up to and including
Day 60 of non-compliance | \$2,000.00 per day |
| c. | For Day 61 and beyond
of non-compliance | \$3,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

28. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI shall be resolved upon motion to this Court as provided in Paragraphs 24 and 25. The stipulated penalties for violations of paragraphs 19 and 20 shall not apply to the extent DMH is in good faith pursuing the purchase of the credits required by this Consent Decree.

29. The filing of a motion requesting that the Court resolve a dispute shall stay Defendant DMH's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendant DMH does not prevail on the disputed issue, stipulated penalties shall be paid by Defendant DMH as provided in this Section.

30. To the extent Defendant DMH prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

31. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

32. Defendant DMH shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing USAO file number 2010v00804. Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Minnesota. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant shall provide written notice, at the addresses specified in Section VIII of this Consent Decree.

VIII. ADDRESSES

33. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO THE UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA:

Ann M. Bildtsen
Assistant United States Attorney
U. S. Attorney’s Office, District of Minnesota
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

B. TO THE CORPS:

Timothy J. Smith, Chief, Technical Services Section
Regulatory Branch
U.S. Army Corps of Engineers, St. Paul District
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

Joseph M. Willging, District Counsel
U.S. Army Corps of Engineers, St. Paul District
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

C. TO DEFENDANT DMH:

Donald M. Huber
625 Main Street, Suite 20B
Windermere, FL 34786

IX. COSTS OF SUIT

34. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendant DMH subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant DMH shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant DMH for noncompliance with or enforcement of this Consent Decree.

X. PUBLIC COMMENT

35. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendant DMH agrees not to withdraw from, oppose

entry of, or to challenge any provision of this Consent Decree, unless the United States has notified it in writing that it no longer supports entry of the Consent Decree.

XI. CONTINUING JURISDICTION OF THE COURT

36. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XII. MODIFICATION

37. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

XIII. TERMINATION

38. This Consent Decree may be terminated by either of the following:

- a. Defendant DMH, through Donald M. Huber, and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or
- b. Defendant DMH may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendant DMH has obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;

2. Defendant DMH has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendant DMH has certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. Within forty-five (45) days of receiving such certification from Defendant DMH, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

Dated and entered this 5th day of March, 2013.

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

ON BEHALF OF THE UNITED STATES:

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

B. TODD JONES
United States Attorney
District of Minnesota

s/Ann M. Bildtsen
BY: ANN M. BILDTSSEN
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Attorneys for the United States

FOR DEFENDANT DMH PARTNERS NORTH, LLC

s/Donald M. Huber
DONALD M. HUBER
DMH Partners North, LLC Governor/Member

Dated: 12/20/2012